United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-4116

To be argued by
STANLEY SCHAIR

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and W. J. USERY, JR., Secretary of Labor,

Respondents,

—and—

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC and its LOCAL No. 301,

Intervenors.

PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

B P/S

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

Issues Presented

1. Was the Commission's finding of a "repeated serious" violation of the eye protection safety standard provided in 29 C.F.R. §1910.133(a)(1) supported by (a) substantial evidence in the record as a whole and (b) the express language of the cited standard? Was it contrary to the Commission's application and the courts' interpretation thereof in other cases?

2. Could the Commission lawfully declare the Company's efforts at complying with the eye protection standard inadequate under the law when such efforts at compliance were more than adequate under the Commission's decisions at the time the citation issued?

3. Did the Secretary of Labor sustain his burden of (a) demonstrating in what manner the Company's conduct fell short of the requirements of the cited standard and/or (b) proving Company knowledge of the alleged violation?

4. Did the Commission err in refusing to find that the alleged eye protection violation was "isolated" within the meaning of the Act?

5. Did the Commission err in determining that the alleged eye protection violation was "repeated" within the meaning of the Act?

6. Was the Commission's finding of a "willful serious" violation of the platform guarding safety standard provided in 29 C.F.R. §1910.23(c)(1) supported by substantial evidence?

7. Was a violation of the cited platform guarding standard within the six-month limitations period provided in the Act proved on the record herein?

8. Did the Commission err in applying the §1910.23(c)(1) standard on platform guarding to the K-11 platform involved herein instead of §1910.28(a)(3) governing scaffolds and temporary platforms?

9. Did the Secretary of Labor sustain his burden of proving employer knowledge of the alleged violation?

10. Did the Commission err in refusing to find that the alleged platform guarding violation was "isolated" within the meaning of the Act?

11. Did the Commission err in determining that the alleged platform guarding violation was "willful" within the meaning of the Act?

Preliminary Statement

This case arose out of an inspection conducted in March 1973 by compliance officers of the Occupational Safety and Health Administration ("OSHA") at two buildings in Schenectady, New York owned by the General Electric Company,[1] petitioner herein.

GE's Schenectady facilities encompass a main plant site comprised of more than 50 separate buildings spread over approximately 130 acres of land and several other buildings located at different sites within the Greater Schenectady Area (255a, 257a).[2] More than 27,000 persons are there employed by 16 separate divisions of the Company (252a-254a). The inspected buildings, numbered 52 and 273, are occupied by the Steam Turbine-Generator Products Division and house, respectively, 400 and 3,500 employees (88a-89a).

In April 1973, the Company was served by OSHA with a notice of citations and proposed penalties which it duly contested. Among the 17 violations therein alleged were (1) a repeated serious violation of 29 C.F.R. §1910.133

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[1] Hereafter referred to variously as the "Company" or as "GE."

[2] Reference is to Joint Appendix.

(a)(1) based upon the alleged failure of two employees to use protective eye equipment and (2) a willful serious violation of 29 C.F.R. §1910.23(c)(1) based upon the alleged absence of standard railings on a powered work platform. It is these two alleged violations that are the subject of this appeal.

As a part of its safety program, GE promulgated rules mandating the use of eye protection equipment, furnished the requisite equipment to its employees and enforced these rules to the extent of discharge of offending employees. It is undisputed that the rules are generally observed and any deviation therefrom is a rare occurrence.[3] Nevertheless, during the OSHA inspection in March 1973, two employees in Building 273 were observed without protective eye equipment.

The bare recital of the foregoing facts describes full compliance with the OSHA safety standard on protective eye equipment, as promulgated by the Secretary of Labor and set forth in 29 C.F.R. §1910.133(a)(1).[4] Yet a sharply divided Commission affirmed the citation.[5] The majority opinion, reflecting the views of Chairman Moran and Com-

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[3] A more detailed discussion of the facts relating to the alleged eye equipment violation with references to the transcript of hearing appears at pp. 10-13 *infra*.

[4] This section provides in pertinent part:

"(a) General (1) Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, *employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors.* No unprotected person shall knowingly be subjected to a hazardous environmental condition." (Italics ours.)

[5] OSHRC Docket No. 2739, CCH 1974-1975 O.S.H.D. ¶19,567 (1975) (344a-410a). The Administrative Law Judge's decision is reported at CCH 1973-1974 O.S.H.D. ¶16,946 (270a-343a).

missioner Cleary, overruled the Commission's previous interpretation of the extent of an employer's responsibility and arbitrarily and retroactively applied a new and unprecedented interpretation of the protective equipment standard. This new interpretation in effect makes every employer an absolute guarantor or insurer of its employees' conduct insofar as the use of eye protection equipment is concerned. In so doing, it overrules and departs from the entire body of legal precedent which had evolved on this subject under the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* (the "Act").

This led the dissenter, Commissioner Van Namee, to declare that "perhaps of all the actions taken by my colleagues in this case their action in finding a repeat violation of 29 C.F.R. §1910.133(a)(1) and assessing a penalty of $2,000 is the most punitive and the least warranted. The record simply does not support their treatment of this issue" (405a-406a).

The Commission was similarly divided on the other cited violation involved in this appeal, namely, the alleged absence of standard railings on a powered work platform. The device in question was at floor level at the time of the inspection and was not in use. No actual hazard or violation therefore was observed by the compliance officers at the inspection; nor was there any proof of any hazardous condition resulting from a failure to use the railings within the six-month limitations period provided in the Act. Based solely on the uncorroborated testimony of the safety director of the Union[6] that at some *unspecified time* in the

[6] Refers to Local 301, International Union of Electrical, Radio and Machine Workers, AFL-CIO, an authorized employee representative under the Act. The Union represents a majority of the hourly employees at GE's Schenectady facilities. Its motion to intervene as a party on this appeal was granted by this court.

past he saw some people on the platform at some unspecified height[7] while no railings were in place, the Commission majority reversed its Administrative Law Judge and upheld the citation for a willful serious violation.

But the Administrative Law Judge had found, and the dissenting Commissioner agreed, that no proof existed of any actual exposure to a hazardous condition within the six-month limitations period. They also concluded that the device in question did not fall within the cited OSHA standard.

Statement of the Case

A. *Nature of the Case and Course of Proceedings*

A hearing on the contested OSHA citations involved herein was held during 1973 in Schenectady, New York before Administrative Law Judge Charles Chaplin (hereafter the "ALJ"). In addition to the Company and Secretary of Labor (hereafter the "Secretary"), the Union appeared as a party. On November 19, 1973, the ALJ issued his Decision and Order affirming eight of the cited violations and vacating nine others. The repeated serious violation of the eye protection equipment standard (29 C.F.R. §1910.133(a)(1)) was upheld and the willful serious violation of the regulation requiring standard railings to guard certain platforms when in use above four feet (29 C.F.R. §1910.23(c)(1)) was vacated by the ALJ.

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[7] The OSHA standard applied does not require the use of standard railings unless the platform is elevated above four feet. A more detailed discussion of the facts relating to the power platform with references to the transcript of hearings appears at pp. 13-15 *infra*.

Subsequently, OSHRC Chairman Moran and Commissioner Van Namee directed review of seven issues raised by the ALJ's decision. Eleven other issues were preserved for Commission review either by the Secretary or the Union. On April 21, 1975, the Commission issued its decision affirming the ALJ in certain respects and reversing him in others. The portions of that decision dealing with the cited violations for failure to use protective eye equipment and to guard a powered work platform with standard railings are here under review.

B. *Disposition Below*

In affirming the ALJ's findings of a repeated violation of §1910.133(a)(1) (eye protection), the Commission majority expressly overruled its earlier decision in *Cam Industries, Inc.*, OSHRC No. 258, 7 OSAHRC 30, CCH O.S.H.D. ¶17373 (1974), *aff'g* CCH O.S.H.D. ¶15113 (1972), dealing with an employer's obligation in regard to the use of protective eye equipment and completely ignored the substantial body of precedent which has evolved under the Act on the general subject of the use by employees of protective equipment (*e.g.* safety glasses or hard hats) supplied by their employers.[8] While formally disclaiming any intention to render the employer an absolute guarantor of its employees' conduct, the Commission majority effectively imposed that very responsibility on this employer.

The far reaching import of the majority's holding is emphasized by the undisputed facts in this record. For its finding that the violations were "foreseeable" and "preventable" discounted entirely the companion finding that:

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[8] See cases discussed at pp. 19-23 *infra*.

> "The record supports the conclusion that, although General Electric is making an effort to promote the use of protective eye equipment, its efforts have not gone far enough. In fact, both employees and employer representatives testified that the failure to use protective eye equipment continues, *albeit in rare instances,* throughout Buildings 52 and 273" (367a). (Italics ours.)

Moreover, notwithstanding the admitted rarity of the instances of non-use of protective eye equipment, the majority found that the failure of two employees out of about 4,000 employees in Buildings 52 and 273 to wear the protective eye equipment which had been supplied by the Company with instructions that it be worn, not only amounted to a violation of the OSHA standards but constituted a "serious" [9] and "repeated" [10] violation. Nowhere in its opinion did the majority suggest a single safety measure which GE failed to take which might have prevented the violation. Nor did it prescribe a single guideline for this employer to follow short of *insuring* universal compliance with its well-publicized and conscientiously enforced safety rule.

As previously indicated, the dissenting Commissioner considered the action of the majority on the eye protection citation as "the most punitive and least warranted" of all their actions in this case (406a). After reviewing the testi-

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[9] In order to establish a "serious" violation under the Act, the Secretary must prove employer knowledge of the specific violation. Act §17(k); *Brennan* v. *OSHRC & Raymond Hendrix d/b/a Alsea Lumber Co.*, 511 F.2d 1139 (9th Cir. 1975), *aff'g Alsea Lumber Co.*, OSHRC No. 1228, 2 OSAHRC 1005, CCH O.S.H.D. ¶15595 (1973).

[10] A "repeated" violation is one that happened more than once "in a manner which flaunts the requirements of the Act" and involves "more flagrant type of conduct than just a single serious violation" (369a).

mony in detail regarding GE's efforts in the eye protection area, Commissioner Van Namee concluded:

> "In view of the foregoing there can be no doubt that even if a violation existed it was a rare and unusual circumstance. Respondent [GE] provided glasses; their use was required and enforced. It did all that was possible in the circumstances, and the citation should be vacated" (407a).

Concerning the powered work platform citation, the majority and dissenting opinions disagreed as to whether the ALJ found this device within or without OSHA standard §1910.23(c)(1) which requires the guarding of "every open-sided floor or platform 4 feet or more above adjacent floor or ground level" by a standard railing or its equivalent. The majority read the ALJ as holding that the work platform was a "platform" [11] within the meaning of the cited standard (380a). The dissenting Commissioner read the ALJ's holding otherwise, stating:

> "He also concluded that the cited standard was inapplicable because the device referred to as a work platform was in fact a scaffold and not within the cited standard. His conclusion was correct for the reasons he assigned" (402a [n. 9]).

Rejecting a credibility determination made by the ALJ on this subject,[12] the majority concluded that there was actual employee exposure to the risk of falling from the device because of the absence of guard rails, apparently

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[11] The cited standard covers floors and platforms but not scaffolds. A scaffold is defined in 29 C.F.R. §1910.21(f)(27) "any *temporary* elevated platform." Thus, the disagreement turned on whether the device in question was a scaffold or temporary platform within §1910.28(a)(3) or a more permanent platform within §1910.23(c)(1).

[12] Joint Appendix, p. 337a.

during the six-month limitations period prescribed by §9(c) of the Act, 29 U.S.C. §658(c) (381a).[13]

The ALJ, however, had found that the compliance officers did not observe the platform in operation and the "record does not establish a violation within the citable period" (338a). The dissenting Commissioner agreed:

> "My colleagues rely on the Union Safety Director's testimony which they quote at page 37 of their opinion. Three conclusions may be drawn from the quoted testimony: (1) the safety director saw people on the platform; (2) his testimony is without reference to time, thus we do not know when he saw the people on the platform and therefore cannot conclude that his observation is within the period of limitations prescribed by 29 U.S.C. 658(c); and, (3) his testimony does not establish an operating height for the platform whereas the standard only requires guarding above four feet. Clearly, the majority errs in finding any violation much less a willful-serious violation on the Union official's testimony" (402a).

C. *The Facts*

(1) The Alleged Violation of 29 C.F.R. §1910.133(a)(1) (Eye Protection)

During the OSHA inspection of Building 273, Bay K-13,[14] one of the compliance officers observed two employees engaged in the operation of breaking up a section of a concrete floor with a pneumatic hammer. The two employees

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[13] But the only testimony cited by the majority failed to establish a time frame for the alleged employee exposure.

[14] Bay K-13 is located in Building 273 and not Building 52 as found by the ALJ (295a). See 133a, 237a. The compliance officer who observed the alleged eye protection violation was also confused concerning the correct identity of the building (61a).

were not wearing any eye protection and were clearly visible to the inspectors (295a, 308a, 42a-44a). A GE safety representative accompanying the inspection party ordered the employees to cease their operation until they put on eye protection and they immediately obeyed his direction (295a, 44a). On the basis of this incident, GE was cited for violating OSHA standard §1910.133(a)(1) concerning the availability of proper eye protection.[15]

Building 273 is a massive structure comprising approximately 22 acres of machine and assembly shops divided into work areas called "bays" (89a). The approximately 3,500 employees housed therein work in a variety of jobs which make up, in part, the 1,700 different job occupations and classifications represented at GE's Schenectady facilities (89a-92a). Throughout this building, as well as Building 52, there are posted signs which are plainly visible stating: "Mandatory That You Wear Eye Protection In the Building At All Times" (295a, 60a, 81a, 135a, 194a).

It is undisputed that eye protection, such as safety glasses (including corrective lenses), is furnished by the Company free of charge to all employees who work in the posted areas (102a, 118a, 130a, 135a, 136a). One of the employees involved in the cited operation testified at the hearing in this case that at the beginning of his employment he was issued safety glasses and advised of the Company's rule respecting their use in posted areas (297a, 241a, 242a).

The two workers involved in the pneumatic hammer operation were not directly supervised (296a). Immediate supervision could not observe them as their supervisors were located in other areas (150a). They were employed

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[15] Set forth in pertinent part at note 4 *supra*.

in the SUO Department which is responsible for performing construction, maintenance and housekeeping functions for all buildings in GE's Schenectady complex and their duties might take them to any of the more than 50 buildings at the main plant alone (237a, 256a).

As to GE's general safety program in the area of eye protection, the Secretary's own witness, the Union's Safety Director, testified as follows concerning the observance of the Company's rule mandating the wearing of safety glasses in the inspected buildings (130a):

> "I would say that the safety glass rule is observed in those buildings."

The Union's attorney saw the Safety Director's testimony on this subject as indicating:

> ". . . that there are very strong regulations at that [GE Schenectady] plant regarding safety glasses. . . ." (132a).

The Union's Safety Director further testified (135a-136a):

> "Q. . . . Now, it is your testimony, I take it, that it is clearly posted in 273 that safety glasses are to be worn, is that correct? A. Yes, it is. It is posted on all the doors.
>
> * * * * *
>
> "Q. This is a fairly rare occurrence, would you say, in 273, to see somebody in that area without safety glasses on? A. Without safety glasses?
> "Q. Yes. A. Yes."

The record clearly shows, moreover, that a failure to observe the Company's strict rules on eye protection might result in disciplinary action up to and including discharge (296a). The Union's Assistant Safety Director testified

at the hearing to at least one instance in Building 273 where an employee was discharged for refusing to wear his safety glasses (152a). In addition, the following exchange took place between the Administrative Judge and counsel for the Union (101a-102a):

> "The Court: They see the inspector coming, and all they have to do is take their goggles off and they have got a violation.
>
> "Mr. Chertkov: At GE, they are fired. I mean that is a great fear. . . ." [16]

Mr. Bernard, the OSHA compliance officer heading the inspection team, observed that GE's rule respecting the use of protective eye glasses was "pretty well complied with" and was prominently posted in all buildings (297a, 194a).

In considering the quality of the Company's overall safety program in the area of eye protection, the ALJ recognized that "the COs [OSHA compliance officers] and the Union Safety Director considered Respondent's [GE's] protective glasses program to be a good one" (331a). He also observed that the violation was "due in major part to employee lapse" (331a).

(2) The Alleged Violation of 29 C.F.R. §1910.23(c)(1) (Powered Work Platform)

The Company was cited for failure to provide a standard railing for a powered work platform located in Building 273, Bay K-11, which could be elevated to a height of ten feet. The Secretary contends that this alleged failure to

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[16] There is testimony that there exists a possibility that one of the employees involved in the pneumatic hammer operation had removed his glasses temporarily solely for the purpose of cleaning them (297a, 234a-236a, 243a). But the ALJ refused to credit the testimony (330a).

provide fall protection is a violation of OSHA standard §1910.23(c)(1).[17]

The ALJ found that in Bay K-11 "there was an unused work platform without any guard of any type although its design permitted removable posts at the corners. No one was using this platform on the day of inspection" (309a). The device employed a scissors technique for elevating the lift, but since it was not in use at the time it was observed, the inspectors did not know how high it was actually elevated when in use (302a).

The record facts establish that the device in question was a hydraulically operated work platform unattached to the real estate and capable of being moved (64a-66a). Although there was testimony by the Union Safety Director that it could be elevated to heights of at least "overhead" (141a), during the entire time the machine was observed by the OSHA inspection team it was not in use and was in its unelevated position flush with the floor (55a-58a). In the corners of the work platform were four to six inch sockets in which detachable standard rails could be inserted when needed (56a). The machine was used to ascend to the side of work pieces such as turbine shells to allow work thereon (224a). It was employed infrequently and irregularly for short periods of time (226a, 63a, 109a).

Leland Weller, the supervisor responsible for the Bay K-11 area of Building 273, testified that removable[18] stand-

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[17] This standard provides in pertinent part:

"(c) Protection of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent . . .) on all open sides. . . ."

[18] Removable rails are necessary because of the nature of the work performed with this machine (56a).

ard rails are provided for the machine and the employees are instructed to install such railings prior to its actual operation (337a, 225a).[19] The foreman in the area told the inspection team that the machine is never used without rails (105a, 63a-64a, 216a).

The only evidence in the entire record concerning the use of this machine without standard rails was the uncorroborated testimony of the Union's Safety Director that he had observed it in use without standard rails at heights over his head at *unspecified times* (141a-143a). The ALJ, after noting his testimony, concluded that the record did not establish any violation of the OSHA standard concerning the use of guard-rails within the citable six-month limitations period provided in Section 9(c) of the Act.

ARGUMENT

POINT I

The finding of a repeated serious violation of Section 1910.133(a)(1) was unsupported by substantial evidence. The measure of employer responsibility originated and imposed by the Commission in this case was beyond its powers under the law.

The Commission majority ruled that GE committed a serious violation of OSHA standard 29 C.F.R. §1910.133 (a)(1)[20] by failing to provide suitable eye protection for two employees engaged in breaking up a section of concrete floor in Bay K-13 with a pneumatic or jack hammer (366a,

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[19] The ALJ concluded that the credible testimony was that GE had instructed its employees that the machine was not to be used without rails (337a).

[20] The text of which is set forth in note 4 *supra*.

n. 24). The majority concluded that the hazard created by this activity, presumably the possibility of injury to the eyes, could have been avoided by compliance with the cited OSHA standard and that since the employees were working out in the open, the Company, with the exercise of reasonable diligence, should have known that they were not using proper eye protection (366a, n. 24).

Section 1910.133(a)(1) requires employers to make suitable eye protection equipment "conveniently available" to their employees where there is a "reasonable probability of injury that can be prevented by such equipment." It also clearly directs that "employees shall use such protectors" and that no person "shall knowingly be subjected" to an eye hazard condition.

The salient facts in this case, as set out at pp. 10-13 *supra,* in themselves bespeak GE's full discharge of its obligations under this standard. But the Commission majority arbitrarily and without sanction or warrant in law has demanded something more of GE, although it is conspicuously silent as to what that something is or, to put it another way, what additional precautions, if any, GE might have taken to prevent the incident for which it was cited.

Pursuing the unprecedented approach taken in this case, the Commission felt compelled to overrule its earlier, but recent decision in *Cam Industries, Inc.,* OSHRC No. 258, 7 OSAHRC 30, CCH O.S.H.D. ¶17373 (1974), *aff'g* CCH O.S.H.D. ¶15113 (1972)[21] in which it had differently inter-

[21] See appendix p. 367a. Commission decisions shall be cited by the OSHRC docket number, followed by citation to the Commission's official reports, where available, and then to the unofficial reports published by the Commerce Clearing House in either its Occupational Safety and Health Decisions or Guide ("O.S.H.D.").

preted the employer's responsibilities under OSHA standard §1910.133(a)(1). It also disregarded the entire body of authority fashioned by the courts and the Commission itself in prior cases to aid in determining the delicate and critical issues invariably presented by reason of the Act's dual imposition of responsibility upon *both* employers and employees to comply with safety requirements. These issues arise with especial frequency in cases involving alleged violations cited against employers but predicated on employee misconduct—most often cases based on the employee's failure to use safety equipment furnished by the employer or to follow employer-established safety practices.

Though the Commission brushes aside the contention urged by the Company that a finding of violation under the facts of this case renders the employer an absolute insurer or guarantor of its employees' compliance (367a), the practical and indeed the inevitable consequences of its opinion are tantamount to such a holding. The Commission's approach, we submit, holds the employer strictly liable for hazardous conduct—deliberate or otherwise—of its employees even in cases where, as here, the employer has established and consistently applied an appropriate and far-reaching safety program to prevent such misconduct on the part of its employees.

The only tenable conclusion supported by the record as a whole was succinctly stated by the dissenting opinion (406a-407a):

> "The record simply does not support their [the Commission majority] treatment of this issue. It is uncontroverted that Respondent [GE] supplies eye protection, posts eye protection equipment use areas, and mandated that employees use the equipment.
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> ". . . [T]here can be no doubt that even if a violation existed it was a rare and unusual circumstance. Respondent [GE] provided glasses; their use was required and enforced. It did all that was possible in the circumstances, and the citation should be vacated. . . ." [22]

The facts in this case, when examined in light of the legal discussion which immediately follows, confirm that by any fair construction of the cited standard GE must be held to have performed its duty under the law. Indeed, we believe that GE's program in the area of eye protection fulfilled a higher standard of conduct than the highest the Commission was empowered to apply.

A. *The Cited Standard Was Not Violated*

The language of the standard is unambiguous. It requires only that an employer *provide* the necessary protective equipment and not knowingly expose an unprotected person to a hazardous condition. Responsibility for the *use* of the equipment is expressly assigned to the employees with the possible exception of situations, not involved here, where an employer knowingly acquiesced in or caused the non-use.

The division of responsibility expressed in this standard implements Congress' manifest intent to impose on both employers and employees responsibility for complying with OSHA safety and health standards. *Engineers, Inc. of Vermont,* OSHRC No. 3551, CCH O.S.H.D. ¶20012 (1975). Thus Section 5(a)(2) of the Act compels compliance by employers with the standards promulgated by the Secretary

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[22] Citing *Brennan* v. *OSHRC and Raymond Hendrix d/b/a Alsea Lumber Co.,* 511 F.2d 1139 (9th Cir. 1975), *aff'g Alsea Lumber Co.,* OSHRC No. 1228, 2 OSAHRC 1005, CCH O.S.H.D ¶15595 (1973).

pursuant to the Act; and Section 5(b) provides that "each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct." [23]

Prior to this case the Commission recognized the separate spheres of responsibility expressly provided in Section 1910.133(a)(1). See, *e.g., Cam Industries, Inc., supra; Nibco of Colorado Division, Nibco, Inc.,* OSHRC No. 302, 9 OSAHRC 325, CCH O.S.H.D. ¶18037 (1974). In *Cam Industries,* the Administrative Law Judge, in dismissing a citation alleging a violation by an employer of this OSHA standard, offered the following interpretation of the standard later affirmed by the Commission:

> "A different situation, however, is presented with respect to the alleged violation of Section 1910.133(a)(1). The obligations prescribed by this section are expressly divided between employers and employees. Whenever protective eye and face equipment is required, the *employer* is required to 'make conveniently available' to his employees a type of protector suitable for the work to be performed. The *employee* then is expressly required to 'use the protectors.' This section places no obligation either expressly or by implication on the employer to assure an employee's use of equipment which has been provided for his sole protection. The evidence is uncontroverted that the three employees on the drill press and milling machines were provided suitable eye protectors by the Respondent and instructed to use them. Therefore, the Respondent has

[23] A virtually identical statement of the division of responsibility is set forth in the OSHA poster (OSHA 2003) which every employer covered by the Act is required to post at the workplace. See 29 C.F.R. §1903.2; Act §17(i).

> fulfilled all of its express obligations under the regulation in question and it is considered unreasonable to hold the Respondent responsible for the failure of the employees to carry out their own express obligations. To hold the Respondent in violation under these circumstances would be to graft an obligation onto Section 1910.133(a)(1) which does not presently exist." (CCH O.S.H.D. ¶15113 at p. 20182; italics ours.)

The uncontroverted record facts in this case (set forth at pp. 10-13 *supra*) clearly establish that GE (1) furnished the employees with eye protectors and (2) instructed them on the Company rule requiring their use in posted areas. There is not the slightest evidence that GE acquiesced in or caused these or any other employees not to use the protective equipment supplied. On the contrary, GE disciplined employees found in violation of its rules.

Accordingly, on the basis of the clear and unambiguous wording of the standard and its interpretation by the Commission in *Cam Industries,* which we submit is the sole interpretation consistent with the standard's language, the only tenable conclusion supportable by the record herein is that GE has fulfilled all of its obligations under the standard. As observed by the Commission itself in *Cam Industries,* "to hold otherwise would be to graft an obligation onto Section 1910.133(a)(1) which does not presently exist."

Yet the Commission refused to vacate the citation against GE and, instead, overruled its 1974 decision in *Cam Industries.* It thereupon proceeded to fashion a new, nebulous and vague standard of employer responsibility, engrafted it onto Section 1910.133(a)(1) and applied it retroactively

to GE.[24] In order to have complied with the standard, said the Commission, the Company should have made some undefined and unspecified effort, in addition to the efforts it already made, to compel the use of eye equipment. Thus the total elimination of those "rare instances" where GE employees failed to use the equipment provided for them was made the absolute responsibility of the Company (367a). The Commission did not articulate its rationale or cite supporting data for this dramatic and completely unexpected reversal in its construction of the cited standard. It merely remarked in passing that its new approach is "intrinsically sounder and verified by experience" (367a).[25]

Even were we to assume, for the purposes of argument, that the Company might have been required to provide something more in its safety program beyond that which

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[24] The standard as thus interpreted and enforced is too vague and, accordingly, the citation should be vacated. *Cape & Vineyard Div. of New Bedford Gas & Edison Light Co.* v. *OSHRC*, 512 F.2d 1148, 1152 (1st Cir. 1975); *AMP Construction Co.*, OSHRC No. 1229, 2 OSAHRC 1251, CCH O.S.H.D. ¶15554 (1973). See generally *Jordan* v. *De George*, 341 U.S. 223 (1951); *U. S.* v. *Cohen Grocery Co.*, 225 U.S. 81 (1921); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1926).

[25] It is axiomatic that an administrative agency must explain the basis for its decisions. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965); *City of Lawrence* v. *CAB*, 343 F.2d 583 (1st Cir. 1965). This is especially true where the agency is changing or deviating from its established decisions or policy. *NLRB* v. *General Stencils, Inc.*, 438 F.2d 894 (2d Cir. 1971), *enf't denied after remand*, 472 F.2d 170 (1972); *Brennan* v. *Gilles & Cotting, Inc. and OSHRC*, 504 F.2d 1255 (4th Cir. 1974); *FTC* v. *Crowther*, 430 F.2d 510 (D.C. Cir. 1970); *City of Lawrence* v. *CAB*, *supra*. Where, as here, the Commission disregarded prior decisional authority without adequate articulation of the reasons therefor, the citation must be vacated. *Id.* Dismissal of the citation is especially called for in this case because the Commission here seeks to declare illegal conduct stamped legal under its own decisions at the time the citation was issued. *NLRB* v. *Majestic Weaving Co., Inc.*, 355 F.2d 854 (2d Cir. 1966).

was required by the decision in *Cam Industries*, the record in this case established beyond question that GE "did all that was possible in the circumstances" (407a). Even the Commission majority could not deny that GE was "making an effort to promote the use of protective eye equipment" and that failure to use eye equipment in Buildings 52 and 273 (which together house almost 4,000 employees) occurred only in "rare instances" (367a). And the ALJ's finding, fully supported by the testimony in the record, was that the Company's rules strictly requiring the use of eye protective equipment were enforced with failure to use such equipment resulting in disciplinary action up to and including discharge (296a; see discussion of facts and testimony quoted at pp. 10-13, *supra*).

It was undisputed that signs were posted throughout the inspected buildings mandating the use of eye protection equipment. Finally, the ALJ, in considering the overall quality of the Company's safety program, observed that *the OSHA compliance officers and Union Safety director considered GE's protective glasses program to be a "good one"* (331a).[26]

In light of these facts, it is evident that GE is doing more than is required under any fair measure of what reasonably

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[26] In two recent cases decided by Administrative Law Judges no violation was found where the employees refused to wear safety hats provided by the employers on the ground that the employers each had an aggressive safety campaign to achieve compliance. *J. A. McCarthy, Inc.*, OSHRC Nos. 3985, 4884, 51[illegible], CCH O.S. H.D. ¶18375 (1974) (Commission Review Ordered); *Seattle Stevedore Co.*, OSHRC Nos. 9114 and 10114, CCH O.S.H.D. ¶19927 (1975) (Commission Review Ordered). Certainly GE's "good" eye protection safety program should have obviated any finding of a violation of Section 1910.133(a)(1).

could be expected of an employer in promoting the use of eye protection[27] under the cited standard.

B. *The Secretary Failed to Sustain His Burden of Proof*

In a case involving the breach of the general duty clause of the Act (Section 5(a)(1)), the United States Court of Appeals was required to analyze the burden of proof which must be met by the Secretary in order to sustain a citation. *National Realty and Construction Co.* v. *OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973). The employer there had been charged with permitting an employee to stand as a passenger on the running board of a front end loader vehicle which subsequently went out of control and crushed the employee who had attempted to leap away from the machine when it began to swerve off the ramp down which it was descending. The court noted that the employer had not "permitted" the employee to ride the vehicle as charged in the complaint and that while the lapse may have occurred as a result of the employer's inadequate enforcement of a safety policy which prohibited such conduct, the citation overemphasized the one happening rather than diverting its attention to the adequacy of the employer's *precautions* against its occurrence. The court ruled that the occurrence of accident-inviting conduct, even though resulting in injury, was not suffi-

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[27] The most onerous measure, consistent with due process, that might arguably be applied is the "reasonably prudent man" test: Did the employer take reasonable precautions against the alleged hazard as would a reasonably prudent man familiar with the industry? *Cape & Vineyard Div. of New Bedford Gas & Edison Light Co.* v. *OSHRC, supra.* GE has clearly more than met this test. Should the Secretary believe that additional standards in regard to an employer's obligations to promote the use of eye protection equipment are desirable, he should initiate proceedings under the Act to promulgate such standards.

cient evidence of a violation. The Secretary, it ruled, had the burden of proving that the employer might have adopted demonstrably feasible measures which would have materially reduced the likelihood of misconduct. It went on to conclude (489 F.2d at 1263):

> "When the Secretary fails to produce evidence on all necessary elements of a violation, the record will—as a practical consequence—lack substantial evidence to support a Commission finding in the Secretary's favor. That is the story of this case. It may well be that National Realty failed to meet its general duty under the Act, but the Secretary neglected to present evidence demonstrating in what manner the company's conduct fell short of the statutory standard. Thus the burden of proof was not carried, and substantial evidence of a violation is absent." (Footnotes omitted.)[28]

Elsewhere in its opinion the court also stated (489 F.2d at 1267):

> "The hearing record shows several incidents of equipment riding, including the . . . [cited episode]. It seems quite unlikely that these were unpreventable instances of hazardous conduct. *But the hearing record is barren of evidence describing, and demonstrating the feasibility and likely utility of, the particular measures which National Realty should have taken to improve its safety policy. Having the burden of proof, the Secretary must be charged with these evidentiary deficiencies.*" (Footnotes omitted, italics ours.)

The court in its analysis of the Secretary's burden of proof explained the rationale underlying its insistence that

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[28] The substantial evidence test is the standard expressly prescribed as applicable on judicial review of an OSHRC decision in Act §11(a).

there be proof establishing the particular steps a cited employer should have taken to avoid citation as well as the feasibility and likely utility of those measures. The Act, the court reasoned, did not impose "strict liability" on the employer; instead, the employer's duty was to be "an achievable one." 489 F.2d at 1265-66. This is especially true with respect to hazards based upon the misconduct of employees. *Id.*

This same rationale was recently adopted by the Ninth Circuit in *Brennan* v. *OSHRC and Raymond Hendrix, d/b/a Alsea Lumber Co.*, 511 F.2d 1139 (9th Cir. 1975), *aff'g Alsea Lumber Co.*, OSHRC No. 1228, 2 OSAHRC 1005, CCH O.S.H.D. ¶15595, a case involving an alleged failure to comply with specific OSHA standards as opposed to the general duty clause of the Act. Citing *National Realty,* the court in *Alsea Lumber* affirmed a Commission decision vacating citations issued against the employer on the basis of employee misconduct. The violations resulted from individual employee conduct—*i.e.* improper equipment operation and failure to wear protective equipment (eye goggles in one instance and a life preserver in another)—which was contrary to the employer's instructions.[29] The court noted that even in measuring an employer's duty with respect to specific OSHA standards, as opposed to the Act's general duty clause, the employer may not be held as "an insurer or guarantor of employee compliance therewith at all times." 511 F.2d at 1144-45. The employer's duty, the court noted, "must be one which is achievable." 511 F.2d at 1145. It went on to conclude that the employer could not be held responsible for its employee's conduct, in vio-

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[29] With respect to the violation for failure to wear eye goggles the same standard was involved in *Alsea Lumber,* 29 C.F.R. §1910.133(a)(1), as is involved in this case.

lation of company rules, in choosing not to wear the eye protection supplied.[30]

The Commission in the instant case concluded that the failure of the two employees to wear their safety glasses was "preventable" (367a). But it failed to cite, nor could it cite, any evidence in the record which would support this conclusion. Indeed, the Secretary did not offer any evidence at the hearing to demonstrate that the alleged violation was in any way preventable.[31] We do not believe such a demonstration could have been supported by evidence. But the absence of such evidence fatally flawed the citation here under discussion.

The Secretary has also failed to carry his burden of proof in another respect and that is employer knowledge of the violation. This issue was also analyzed in great detail in *Alsea Lumber,* wherein the court concluded (511 F.2d at 1143):

> "In our view, the Secretary has at least the initial burden of establishing a *prima facie* case of employer knowledge before the burden of going forward shifts to the employer.

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[30] The burden of proof placed on the Secretary to establish the feasibility of preventing an alleged violation was also recognized in *Brennan* v. *OSHRC and Hanovia Lamp Div.; Canrad Precision Industries,* 502 F.2d 946 (3d Cir. 1974), *vacating and remanding,* OSHRC No. 89, 2 OSAHRC 55, CCH O.S.H.D. ¶15355 (1972), *on remand,* CCH O.S.H.D. ¶19672 (1975), where the Secretary affirmatively came forward with proof as to measures required to prevent the violation. See also *C. F. & I. Steel Corp.,* OSHRC No. 6027, 16 OSAHRC 45, CCH O.S.H.D. ¶19302 (1975).

[31] Mere speculation by the Commission that violation was "preventable" cannot cure the evidentiary deficiencies *sua sponte.* As indicated by the court in *National Realty,* "to merit judicial deference, the Commission's expertise must operate upon, not seek to replace, record evidence." 489 F.2d at 1267.

"... The statute states that *unless* the employer has knowledge, no serious violation may exist. *Therefore, to prove the very existence of a serious violation, the Secretary must prove that the employer had knowledge of the condition alleged to be a violation.*

"We hold therefore that the Commission's procedural requirement, placing upon the Secretary the burden of proving all elements of a violation, one element of which is employer knowledge thereof, is a proper exercise of the Commission's authority under the Act.

"What we have said respecting the burden of proof of employer knowledge is equally applicable to both serious and non-serious violations if employer knowledge be equally an element of both." (Footnotes omitted; italics ours.)

As for the alleged eye protection violation, the court in *Alsea Lumber* held (511 F.2d at 1145):

"We fail to see wherein charging an employer with a non-serious violation because of an individual, single act of an employee, of which the employer had no knowledge and which was contrary to the employer's instructions, contributes to achievement of the cooperation sought by the Congress. *Fundamental fairness would require that one charged with and penalized for violation be shown to have caused, or at least to have knowingly acquiesced in, that violation. Under our legal system, to date at least, no man is held accountable, or subject to fine, for the totally independent act of another.* A conspiracy to violate the Act is neither alleged nor reflected in the record before us. . . .

"To revise the citation for non-serious violation No. 5 [eye protection] herein would be to subject an employer to a standard of strict liability, under the special duty clause, for deliberate employee misconduct. We do not find that result to be within the intent of the Congress." (Italics ours.)[32]

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[32] The *Alsea Lumber* opinion was relied on by the dissenting Commissioner in the case herein to support his view that the cita-

The Commission herein found that since the employees were working out in the open, with the exercise of reasonable diligence GE could have known that they were not using proper eye protection. But this finding standing unsupported offers no illumination as to the *form* of due diligence which would have disclosed the non-use of protective equipment by two employees out of 4,000 *at any given moment.*

The *Alsea* decision seems particularly applicable under these circumstances since the employees who failed to use protective equipment in that case, as here, were not hidden from view. And in *Alsea,* as here, there was no evidence in the record that the employer had any knowledge of the cited instances of employee disobedience of its established rules and practices. Yet GE was found in violation of the standard and the citation against the employer in *Alsea* was dismissed. This can be viewed as no less than a completely arbitrary and capricious action on the part of the Commission and the dissenting Commissioner so found (405a-408a).[33]

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tion should be vacated. It has since been cited with approval by the Commission itself in *Engineers, Inc. of Vermont,* OSHRC No. 3551, CCH O.S.H.D. ¶20012 (1975) and a Commission Judge recently dismissed a citation based on failure to use protective equipment on the ground of lack of employer knowledge. *J. K. Butler Builders, Inc.,* OSHRC No. 12354, CCH O.S.H.D. ¶19946 (1975) (Commission Review Ordered).

[33] Any suggestion that immediate and constant supervision is necessary has been rejected by the Commission in other cases. *Canrad Precision Industries, supra; Solomon Construction Co.,* OSHRC No. 2576, 4 OSAHRC 1050, CCH O.S.H.D. ¶16529 (1973); *Arnold Hansen d/b/a Hansen Brothers Logging;* OSHRC No. 141, 1 OSAHRC 869, CCH O.S.H.D. ¶15258 (1972).

C. *The Alleged Violation Was "Isolated"*

We submit the Commission erred in not vacating the citation on the grounds that the alleged violation was "isolated" within the meaning of the Act, especially in view of the number of employees working in the buildings and the finding that violations of this type were rare. The criteria for finding an isolated violation were all present in this case: (1) existence of a company rule; (2) deviation from the rule is not common; (3) the rule is enforced; (4) the violation was unknown to the employer. *Standard Glass Co., Inc.*, OSHRC No. 259, 1 OSAHRC 594, CCH O.S.H.D. ¶15146 (1972); *Murphy Pacific Marine Salvage Co.*, OSHRC No. 2082, CCH O.S.H.D. ¶19205 (1975) (concurring opinion). In *Standard Glass* the Administrative Law Judge, in dismissing a citation for failure of two employees to wear hard hats as required, stated:

> "An employer cannot in all circumstances be held to the strict standard of being an absolute guarantor or insurer that his employees will observe all of the Secretary's standards at all times. An isolated brief violation of a standard by an employee which is unknown to the employer and is contrary to both the employer's instructions and a company work rule which the employer has uniformly enforced does not necessarily constitute a violation of section 5(a)(2) of the Act by the employer."

The Commission in refusing to find the alleged violation here as "isolated" did so without meaningful explanation. Cf. *Murphy Pacific Marine Salvage Co., supra.*

D. *The Alleged Violation Was Not "Repeated"*

The Commission here defined a repeated violation as one "happening more than once in a manner which flaunts the

requirements of the Act" (369a). The Commission adopted the Administrative Law Judge's finding that the violation was "almost identical" to an earlier violation of the same OSHA standard in December 1971, some fifteen months before this one, but does not explain why the later violation "flaunts the requirements of the Act." We submit that even if there was a violation, it should not be classified as a repeated violation under the Commission's own definition in this case. The dissenting Commissioner agreed (399a-401a).

"Flaunt" is defined in *Webster's New World Dictionary of the American Language*[34] as "1. to make a gaudy, ostentatious, conspicuous, impudent, or defiant display: as, brazen women flaunt through the town . . . v.t. to show off proudly, defiantly, or impudently: as, he flaunts his guilt" (at p. 552). There is nothing about this alleged violation which fits that definition.[35]

In order to establish that a violation flaunts the requirements of the Act and is thus "repeated", the Secretary must prove something more than a bare recurrence of the same violation. *Zwicker Electric Co., Inc.*, OSHRC No. 12271, CCH O.S.H.D. ¶20052 (1975) [Commission Review Ordered]; *Donald Harris, Inc.*, OSHRC No. 10434, CCH O.S.H.D. ¶19699 (1975) (Commission Review Ordered). It has been held that a violation is not "repeated" where it consists of isolated instances of noncompliance with the stand-

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[34] Published in New York by the World Publishing Company in 1958.

[35] If "flout" were intended instead of "flaunt" the definition thereof is equally inapplicable. *Webster's New World Dictionary* defines "flout" at p. 557 as follows: "to mock or scoff at; show scorn or contempt for."

ards in circumstances where the employer is a large company with extensive facilities. *International Terminal Operating Co., Inc.*, OSHRC No. 12272, CCH O.S.H.D. ¶20011 (1975). And, in *Metropolitan Stevedore Co.*, OSHRC No. 7563, CCH O.S.H.D. ¶19951 (1975), the Commission refused to classify a second violation by the employer of the hard hat standard as "repeated", since the circumstances did not demonstrate the attitude of defiant disregard of law which properly evokes application of that term. The employer there, as here, supplied its employees with the required equipment and had a rule requiring its use.

SUMMARY

The Commission's decision finding the Company derelict in its duty to provide protection for the eyes of its employees is at odds with the language of its own regulations, with its own *prior* decision, with its agreement with the reasoning of a *later* court decision, and with any rational or just reading of the governing statute. The carefully drafted concept of shared responsibility by employers and employees with regard to protective devices whereunder the former must *supply and demand use* thereof and the latter must *make* such use is imbedded in the Act. The decision here violates that concept and vastly expands the employer's responsibility beyond anything contemplated by the Act. It says in effect that an employer who supplies and demands use of such devices, and has by its enforcement program reduced cases of non-users to a rarity, must actually underwrite or guarantee that its employees will perform *their* duty as well as its own. This attempt to hold an employer responsible for willful non-use by an employee of safety devices, in defiance of the Company's

program to enforce their use, is not an interpretation of the Act but a revision of it. To find the Company to be a serious violator on this record, we submit, is an unsupported and unsupportable conclusion.

POINT II

The finding by the Commission of a willful serious violation of Section 1910.23(c)(1) was unsupported by substantial evidence. The Secretary failed to sustain his burden of proving a violation of the cited standard within the six-month limitations period and the cited standard, itself, is inapplicable to the K-11 powered work platform here involved.

The Commission majority ruled that GE had committed a willful serious violation of OSHA standard 29 C.F.R. §1910.23(c)(1) by failing to guard a certain powered work platform located in Bay K-11 of Building 273[36] with a standard railing or its equivalent. The majority opinion, reversing the ALJ, concluded that the cited OSHA standard applied to the K-11 platform and that the "evidence clearly demonstrates that there was exposure to the risk of falling because of the absence of any fall protection" (380a-381a).

Section 1910.23(c)(1) requires open-sided floors, platforms and runways four feet or more above the adjacent floor to be guarded by a standard railing or its equivalent.

As we shall discuss more fully in subpart B *infra*, the Commission's finding in this case of a willful serious violation is at variance with virtually all previous Commission decisions applying the cited standard. With but a single

[36] Hereafter sometimes referred to as "the K-11 platform."

exception (before the Commission's decision in this case), that standard has been applied solely to fixed platforms attached to the real estate, as opposed to platforms which are movable, unattached devices used infrequently and irregularly for short periods of time (336a). The K-11 platform falls within this latter category. The majority's attempt to broaden its scope and coverage to encompass devices such as the K-11 platform goes beyond the powers granted to the Commission under the Act. It constitutes an unauthorized intrusion by the Commission into the area of safety standard promulgation, an area expressly withheld from it by Congress in passing the Act.[37]

The retroactive application of the standard, as summarily expanded by the Commission, to this employer's K-11 platform is the very kind of *ad hoc* adjudication to formulate new standards of conduct which was strongly criticized by this court in *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966). As the court there stated (355 F.2d at 860):

> "Although courts have not generally balked at allowing administrative agencies to apply a rule newly fashioned in an adjudicative proceeding to past conduct, a decision branding as 'unfair' conduct stamped 'fair'

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[37] As earlier observed in connection with the alleged violation of the protective eye equipment standard, if the Secretary is of the opinion that the safety of employees would somehow be furthered by extending the reach of the cited standard here under discussion to cover devices such as the K-11 platform, the sole method authorized by the Act to accomplish this result is the standard promulgation procedure contained in Section 6(b) thereof. The attempt to bypass this procedure and achieve the result by the shorter road of Commission decision is at odds with provisions of the statute, itself, and Congress' obvious intent to separate the standard making and judicial functions thereunder. Cf. *NLRB* v. *Wyman Gordon Co.*, 394 U.S. 759 (1969); *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860-61 (2d Cir. 1966).

> at the time a party acted, raises judicial hackles considerably more than [certain other enumerated determinations] . . . . And the hackles bristle still more when a financial penalty is assessed for action that might well have been avoided if the agency's changed disposition had been earlier made known, or might even have been taken in express reliance on the standard previously established."

On this basis alone the citation here under discussion should be vacated. As we shall see, the potential mischief and confusion created by the Commission's action here is considerable and should not be underestimated. The inevitable doubts generated in employers and the absence of fair notice to them as to which of several differing OSHA standards[38] on platform and/or scaffold guarding they will be held to by the Commission result in a situation which is patently unfair to employers and, more importantly, does not in any way contribute to the increased safety of their employees. In this case the employees were protected by a different OSHA standard from the one erroneously applied against the Company, namely §1910.28 covering the guarding of scaffolds which are defined by the standards as temporary platforms. There is no claim, nor could there be, that the record facts here would support a violation of that standard.

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[38] *E.g.*, under §1910.23(c)(1), standard railings are required at heights of 4 feet or higher; under §1910.28 at more than 10 feet and under §1926.500(d)(1) at 6 feet or higher. All of these standards cover certain types of platforms (including scaffolds which are defined in §1910.21(f)(27) as "any temporary elevated platform"). Thus, an employer would be perfectly justified in not guarding a platform which falls within the coverage of §1910.28 at heights of up to 10 feet. Should that same platform, however, be subsequently deemed, instead, as within the ambit of §1910.23(c)(1), the employer's failure to provide proper guarding at those same heights would constitute a violation of the Act subjecting the employer to citation and financial penalties.

Even were the cited standard applicable in this case, as maintained by the majority opinion, the Commission's conclusion that a willful serious violation was made out on the record before it is unsupported by substantial evidence. The operative facts, set forth *in extenso* at pp. 13-15 *supra,* fail to support a violation, much less a "serious" and "willful" violation, of the cited standard within the six-month limitations period prescribed in the Act.

A. *The Commission's Decision Is Unsupported by Substantial Evidence*

The Commission's order is unsupported by substantial evidence in the record as a whole in that the Secretary has failed to prove that the alleged violation occurred within the applicable limitations period.

The limitations period, as contained in Section 9(c) of the Act, 29 U.S.C. 658(c), provides:

> "No citation may be issued under this section after the expiration of six months following the occurrence of any violation."

In order to sustain a violation the Secretary must prove some exposure (actual or potential) to the cited hazards within six months prior to the citation. *General Telephone Co. of Ohio,* OSHRC No. 3393, CCH O.S.H.D. ¶17301 (1974). Thus, in *General Telephone* the citation was dismissed where there were no employees working in the hazardous area at the time of the inspection and the Secretary was not able to determine when employees last worked there.

In the instant case there was no evidence that any violation took place within the six-month statute of limitations. Thus the ALJ concluded:

"The final guardrail allegation pertains to a powered work platform in Bay K-11. This elevator was not seen in operation by the CO [compliance officer]. It had sockets for the purpose of erecting demountable guardrails (or equivalent) and although these were not located at the time of the inspection the credible testimony was that Respondent's [GE's] instruction to its employees was that the elevator was not to be used without rails. I am thus confronted with the situation I addressed in *Secretary of Labor* v. *Armor Elevator Co., Inc., supra,* where the work situation is non-static in nature, i.e., it requires an affirmative act by the employee to create the violation. *The unguarded powered work platform standing alone is insufficient to establish the violation.* The Secretary has recognized this by providing in his *Occupational Safety and Health Compliance Operations Manual*[26] that 'As a general rule working conditions . . . shall be cited only when actually observed by a CSHO [compliance officer] during the course of an inspection . . .'" (337a; italics ours.)[39]

"[26] Chapter 12, C. 1 (page X-5)."

He further concluded:

"While there was testimony that this elevator had been operated in the past without guard rails the COs did not see it so operated and the record does not establish a violation within the citable [6-month limitations] period" (338a).

[39] The failure of the compliance officers to follow the published OSHA Compliance Manual, as noted by the ALJ, in itself warrants dismissal of the citation herein. The Secretary did not prove any special circumstances to justify departure from the Manual's requirement that violations must be observed. Noncompliance with published agency rules has long been recognized as a basis for vacating an agency citation or charge. *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Service* v. *Dulles,* 354 U.S. 363 (1957). See also Commission decision in *Alsea Lumber Co., supra,* where the Commission itself vacated a citation on the ground that the compliance officer did not observe the violation *during* the inspection but had observed it prior thereto.

The Commission majority, in reversing the ALJ, found (without making *any* reference to the time of the alleged violation) that there was actual employee exposure to the risk of falling because of the absence of any guarding on the K-11 platform. This finding was based *entirely* on the the uncorroborated testimony of the Union's Safety Director who claimed that he had observed the platform in use at heights over his head, possibly at six or eight feet (141a-143a), without a standard guardrail around all open sides (381a).

The dissenting Commissioner correctly concluded that this reliance was misplaced (402a):

> "My colleagues rely on the Union Safety Director's testimony which they quote at page 37 of their opinion. Three conclusions may be drawn from the quoted testimony: (1) the safety director saw people on the platform; (2) *his testimony is without reference to time, thus we do not know when he saw the people on the platform and therefore cannot conclude that his observation is within the period prescribed by 29 U.S.C. 658(c);* and, (3) his testimony does not establish an operating height for the platform whereas the standard only requires guarding above four feet. Clearly the majority errs in finding any violation much less a willful-serious violation on the Union official's testimony." (Italics ours.)

On this record, the finding of the majority is not supported by substantial evidence and, therefore, is not binding upon this court. Act §11(a); *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951). In determining whether there is substantial evidence, the court must take into account evidence which detracts from the weight of evidence relied on by the Commission. *Universal Camera*

Corp. v. *NLRB, supra; NLRB* v. *Metropolitan Life Ins. Co.,* 405 F.2d 1169 (2d Cir. 1968). And, even where the issue does not turn on credibility alone, the ALJ's findings of fact and the inferences he drew therefrom must carry weight against the claimed existence of substantial evidence to support the Commission's decision. *NLRB* v. *Majestic Weaving Co., supra* at 859.

The credible evidence, as found by the ALJ, is that removable railings are provided for the K-11 platform and employees are instructed to install them prior to the platform's actual operation (337a, 225a). While *removable* railings are necessary because of the nature of the work performed with the K-11 platform (56a), the foreman in the area told the inspection team that it was never used without mounting the railings (105a, 63a-64a, 216a). Both the ALJ and dissenting Commissioner concluded that the evidence in the record did not support a finding of violation within the six-month limitations period.

The Union's Safety Director's testimony is uncorroborated and, we submit, highly suspect. He not only failed to specify the time when he allegedly observed the K-11 platform in use but his testimony was somewhat vague on the height at which the platform was elevated. His testimony in this regard was:

> "Well, I believe that I seen it probably, again, and I don't know the height, and maybe in the 6 to 10 foot height, over my head, anyway" (141a).

The record, moreover, indicates that the Union's Safety Director was not a disinterested witness. Indeed, his attitude toward the Company might be described as punitive. He constantly sought to persuade OSHA personnel to inter-

vene in his behalf with the Company because of what he perceived was a "communications problem" between the Union and Company on safety matters (139a-140a, 125a). And he continually urged that all violations of safety standards by GE should be classified as "willful" (139a-140a). The OSHA inspection itself was brought about as a result of a meeting between the Union Safety Director and OSHA Regional Office personnel (125a-126a). Thus, he had an interest in the outcome and was not a mere observer.

The Commission erred in refusing to accept the ALJ's findings concerning the alleged violation here under discussion. Substantial evidence "is more than a mere scintilla"; it means such evidence as a reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938). Mere speculation or suspicion that a violation occurred within the six-month limitations period is totally inadequate to support the citation herein. *NLRB* v. *Freeman Co.,* 471 F.2d 708 (8th Cir. 1972); *NLRB* v. *Mount Vernon Telephone Corp.,* 352 F.2d 977 (6th Cir. 1965).[40]

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[40] The Commission's decision, as earlier indicated in this discussion, turned on its finding of *actual* employee exposure (OSHRC Opinion p. 37; OSHRC Dissenting Opinion p. 58). The Commission majority refused to decide the question of whether there was *potential,* as opposed to *actual,* employee exposure to the alleged falling hazard. But the record, we submit, does not support potential exposure. In order to establish potential employee exposure this court has required the Secretary to prove that (1) a "hazard has been committed" and (2) the area of the hazard was accessible to the employees. *Brennan* v. *OSHRC and Underhill Constr. Corp.,* 513 F.2d 1032 (2d Cir. 1975). The Secretary has failed in the instant case to prove the former. Since the K-11 platform did not require railings under the cited standard until it was elevated and used at heights of four feet and above, there could be no hazard committed when the platform was in its unused, unelevated position. As the ALJ observed, this case presents a "non-static" situation which requires

B. *The Cited Standard Is Inapplicable*

29 C.F.R. Part 1910.23(c)(1) provides in pertinent part:

> "(c) *Protection of open-sided floors, platforms, and runways.* (1) *Every open-sided floor or platform* 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides . . . ." (Italics ours.)

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affirmative acts by employees to commit a hazard; for the unguarded platform, standing alone, is insufficient to establish a violation. The court's decision in *Underhill Construction* is clearly distinguishable on the facts. There the violations involved "static" situations which were inherently unsafe. One concerned the storage of materials inside a building under construction. Under the cited standard (§1926.250(b)(1)) such materials were not to be placed within 6 feet of any inside floor openings nor within 10 feet of an exterior wall. The other violation involved a failure to guard open-sided floors 6 feet or more above the ground with standard railings or their equivalent. In both these cases the existing situation, in itself, constituted a hazard and was a violation of the cited standard. There was no need for any additional act by an employee to create the hazard. In the instant case, the existence of the K-11 platform at floor level or when used at heights up to 4 feet constituted no hazard under the cited standard. Indeed it would take at least two acts on the part of an employee to create a hazard: (1) elevate the platform to 4 feet or above and (2) disregard GE's instruction and fail to insert the railings provided for the platform. While the Commission has sustained static violations involving inherently unsafe equipment (*Harold Christiansen*, OSHRC No. 3108, CCH O.S.H.D. ¶17204 (1974), *aff'd*, CCH O.S.H.D. ¶20,517 (1976) (Affirmed subsequent to filing of the proofs of Petitioner's Brief), it has refused to uphold, prior to the instant case, citations for nonstatic violations not observed by the compliance officer (*Armor Elevator Co., Inc.*, OSHRC Nos. 425 and 426, 5 OSAHRC 260, CCH O.S.H.D. ¶16958 (1973) (involving use of a portable ladder); *H-E Lowdermilk Co.*, OSHRC No. 133, 7 OSAHRC 987, CCH O.S.H.D. ¶15163 (1972), *aff'd*, CCH O.S.H.D. ¶17656 (1974) (failure to have working headlights when not required by the light conditions when observed). There was nothing inherently unsafe about the K-11 platform when observed by the compliance officers and, accordingly, the resulting citation was improper.

GE was improperly cited under §1910.23(c)(1) because the K-11 powered work platform is not a "platform" within the scope of the cited standard but is rather a scaffold or temporary elevated platform within the ambit of §1910.28 (a)(3).[41] Application of the correct standard would have resulted in no citation being issued even under the Commission majority's view of the facts. This is so because the K-11 platform is not required under §1910.28(a)(3) to have guardrails until it it used at heights exceeding ten feet. But if it is deemed within the purview of §1910.23(c)(1), it must have a railing when used at heights of four feet or above. The platform here in question could not be elevated in excess of ten feet and the only testimony in the record concerning observations of its use estimated that it was used at over-the-head heights of possible 6 or 8 feet (141a).

Section 1910.23 by its terms was designed to regulate structures of a relatively permanent nature as opposed to those used temporarily or infrequently. This is apparent from the types of hazards regulated by the standard read as a whole, *viz.*, floor and wall openings, stairs, etc. In *Interstate Dress Carriers, Inc.*, OSHRC No. 2777, 6 OSAHRC 439, CCH O.S.H.D. ¶17154 (1974), the Commission vacated a citation under §1910.23(d)(1)(iii) finding that section applied only to *fixed* industrial steps. *Portable* steps were either covered by a different standard (§1910.29) or not covered at all. And, in *Cam Industries, supra,* the Commission ruled that as used in §1910.23(c)(1) "platforms and open-sided floors" are used synonymously.

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[41] Alternatively, it could be argued that it is covered by 29 C.F.R. §1910.29 which deals with mobile scaffolds and mobile work platforms and does not require standard railings unless used at heights of 10 feet or above.

The definitions of the terms "platforms" (as used in §1910.23(c)(1)) and "scaffold" (as used in §1910.28) support this construction because both are defined as being elevated platforms, the difference being that the latter is temporary in nature.

> "Platform. A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery." §1910.21 (a)(4).
>
> "Scaffold. Any *temporary* elevated platform and its supporting structure used for supporting workmen or materials or both." §1910.21(f)(27).[42] (Italics ours.)

The ALJ found that "a review of some 20 cases involving citations under the standard here in issue reveals that all but one involved runways, loading platforms, storage areas, platforms in slaughtering plants or the top of an existing structure within the plant" (336a). And, with the exception of the instant case his statement continues to stand true to this date. The one exception cited by the ALJ involved structures which, although temporary in construction, were permanent in use. *U. S. Homes, Inc., Sandler-Bilt Div.*, OSHRC No. 367, 1 OSAHRC 911, CCH O.S.H.D. ¶15227 (1972). The test of whether a structure is within §1910.23(c)(1), according to the ALJ, is whether the structure is temporary in both construction and use. The question here, therefore, must turn on how the K-11 platform is actually used at GE (336a).

The K-11 platform is a mobile, rather than a fixed, platform (64a-66a). It is employed to ascend the side of work

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[42] See also §1910.27(g)(15) which similarly defines "scaffold" as used in §1910.29.

pieces such as turbine shells to all work thereon (224a) and is used infrequently and irregularly for short periods of time (226a, 63a, 109a). It is obvious, on these facts, that the K-11 platform is, when in use, a temporary elevated platform or scaffold rather than the fixed and more permanent type of platform described in §1910.23(c)(1).

Yet the Commission majority without explanation found the K-11 powered work platform within §1910.23(c)(1). The dissenting Commissioner, however, held that it was a scaffold or temporary platform not covered by the cited standard.[43] The plain fact of the matter is that the majority opinion ignored the crucial circumstance that the subject of *platform* guarding is covered by several differing standards depending upon the platform's construction and use.

The resulting decision has as a practical matter made employer compliance with the varying standards on guarding difficult if not impossible[44] for it has obliterated the hitherto existing guidelines as to which types of structures or platforms will be deemed within §1910.23(c)(1) and which will not.

The Commission's interpretation of §1910.23(c)(1) is not entitled to deference by this court because, as we have shown, it is not derived from the statute and, in fact, is

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[43] As noted p. 9 *supra*, the majority erroneously read the ALJ as holding the K-11 platform to be covered by §1910.23(c)(1). In fact an application and extension of his reasoning (ALJ pp. 67-68) refutes this reading and the dissenting Commissioner obviously recognized this (402a, n. 9).

[44] The weldelevator, an elevated work platform similar in construction to the K-11 powered work platform was originally cited by the Secretary in this case under §1910.29 as a *mobile scaffold.*

contrary to the language of the promulgated standards and prior precedent. *IBEW, AFL-CIO* v. *NLRB*, 487 F.2d 1143 (D.C. Cir. 1973), *aff'd*, 417 U.S. 790 (1974).

C. *The Secretary Has Failed to Sustain His Burden of Proving Employer Knowledge*

The Secretary has not sustained his burden of proving that GE knew or, with the exercise of reasonable diligence, should have known of the alleged violation. This is an essential element of the violation and the Secretary's failure to prove it in and of itself requires the dismissal of the citation. *Brennan* v. *OSHRC and Raymond Hendrix, d/b/a Alsea Lumber Co., supra.*[45]

As earlier discussed, the K-11 platform was used infrequently (about once a month), irregularly and for short periods of time. The ALJ had concluded that Company rules required the mounting of railings prior to the operation of the platform and there was testimony that such railings were actually used. Even if the Union Safety Director's testimony on his observing a violation is accepted as credible—and we submit it is highly suspect—it is insufficient to establish GE's actual knowledge of the alleged violation or that GE caused or acquiesced in any departure from its rules requiring the use of standard railings or their equivalent.

D. *The Alleged Violation Was an "Isolated Violation"*

If there was a violation at all in this case—and we submit there was not—the violation was an isolated one caused entirely by employee misconduct. It, therefore, would not

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[45] For a full discussion of *Alsea Lumber* and the other legal authorities on this subject see pp. 26-28 *supra*.

support a citation against the Company. See *Standard Glass Co., Inc., supra,* and other cases cited at p. 29, *supra.*

E. *The Alleged Violation Was Not Willful*

"Willful" violations are the most severe in the list of permissible civil penalties provided in the Act.[46] The size of the penalty that can be imposed is ten times that for a violation merely classified as "serious." As recognized by the Commission, "Congress intended to deal with a more flagrant type of conduct . . ." (369a). Accordingly, "willful" violations have been construed narrowly for to do otherwise would obliterate the line between "serious" and "willful" violations, thereby erasing the concept imbedded in the Act of a graduated penalty structure. *Frank Irey, Jr., Inc.* v. *OSHRC and Brennan,* No. 73-1765, 519 F.2d 1200 (3d Cir. 1974), *aff'd on rehearing en banc,* 519 F.2d 1215 (3rd Cir. 1975).

In *Frank Irey,* the Third Circuit ruled that the Commission's definition there of willful, which was similar to that applied here, was too broad:

> "Willfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission —it invo es an element of obstinate refusal to comply." CCH O.S.H.D. at p. 22730.

The record in this case is void of substantial evidence to establish a willful violation, as defined in *Frank Irey,* based on the K-11 platform citation. The ALJ vacated this citation and therefore did not pass on the alleged willfulness

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[46] Act §17(a). The Act, however, does not define the term "willful violation."

of the cited violation. And the Commission, in reversing the ALJ and upholding a willful violation, offered no rationale or explanation as to why it classified the violation as willful.

Prior Commission decisions relied on by the majority are inapposite to the case at bar on their facts. In *Wetmore & Parman, Inc.*, OSHRC No. 221, 2 OSAHRC 288, CCH O.S.H.D. ¶15400 (1973) and *Intercounty Construction Corp.*, OSHRC No. 919, 5 OSAHRC 782, CCH O.S.H.D. ¶17044 (1973), *enf'd, Intercounty Construction Co.* v. *OSHRC*, 522 F.2d 777 (4th Cir. 1975), Petition for cert. filed 44 U.S.L.W. 3416 (No. 75-594 (1975)), the Commission found willful violations where the employers after being advised by OSHA compliance officers of patent violations consciously chose not to comply with the Act. Thus, in *Wetmore* the employer upon reinspection refused to install a safety railing on the sixth floor. And, in *Intercounty*, the employer ordered that the required safety device *not* be used.

The touchstone of a willful violation is that it is a knowing, intentional and deliberate disregard of the cited standard. See, *e.g., F. X. Messina Construction* v. *OSHRC*, 505 F.2d 701 (1st Cir. 1975) (foreman intentionally failed to order a trench shored as he knew was required); *C. N. Flagg & Co.*, OSHRC No. 1734, 11 OSAHRC 632, CCH O.S.H.D. ¶18686 (1974), *petition to review denied*, —— F.2d ——, CCH O.S.H.D. ¶20,501 (2d Cir. 1976)[46a] (foreman ordered work to be performed in a manner which he knew violated the Act). See also *Alpha Poster Service, Inc.*, OSHRC No. 7869, CCH O.S.H.D. ¶19647 (1975) (Commission Review Ordered); *Graven Bros. & Co.*, OSHRC No.

[46a] Petition for review denied subsequent to filing of proof of Petitioner's Brief.

2358, CCH O.S.H.D. ¶17176 (1974). No intent to disregard the cited standard has been proven in this case.

Further, where, as here, there is a good faith disagreement as to the application of the cited standard, no willful violation may be found. *C. N. Flagg & Co., Inc. d/b/a Northeastern Contracting Co.,* OSHRC No. 1409, CCH O.S.H.D. ¶19251 (1975). The Commission, it should be noted, applied this principle with respect to another alleged violation in this case, namely a failure to guard a stator frame, but failed to give it any consideration with respect to the K-11 powered work platform.[47]

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[47] The bases upon which OSHA officials classified the alleged K-11 platform violation as willful are totally arbitrary. Indeed the procedure followed by OSHA to determine the classification is, in itself, of questionable validity. The decision was made at a committee meeting attended by three OSHA employees (156a). It was founded upon two criteria neither of which meet the test of "willfulness" mandated by the *Frank Irey* case. First, that the Company had violated OSHA standard .23(c)(1) in the past and, secondly, that Union representatives had spoken with representatives of the Company concerning .23(c)(1) prior to the inspection (199a-205a). No consideration was given to the content of the GE-Union discussions or to the nature of the prior violations (204a-205a). The Union's Safety Director was permitted, improperly we submit, to discuss the results of the OSHA inspection, and presumably the categorization of the alleged violations, with OSHA prior to its issuance of the citations (144a). Additionally, one of the compliance officers (Bernard) testified that the committee's decision on classification of the violation as "willful" was reached via the use of a "draft" revision of the OSHA Compliance Manual (156a-158a). The use by OSHA against the Company of such unpublished guidelines, we submit, violates the Administrative Procedure Act (5 U.S.C. 552). See *Hotch* v. *U. S.*, 212 F.2d 280, 283 (9th Cir. 1954). Finally, the committee classifying the alleged violation ignored several factors indicating that GE's overall safety program was effective in many respects (188a, 198a, 218a, 194a. 73a, 769a-80a). *One of the compliance officers admitted that he had made a statement to the effect that GE's Schenectady operation was in the top ten percent of all industry with regard to safety* (196a-197a).

CONCLUSION

For the foregoing reasons, the portions of the Commission's decision and order here under review should be set aside and the citations of violation therein upheld should be vacated.

Dated: New York, New York
May 3, 1976

Respectfully submitted,

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Joseph Boselli , being duly sworn, deposes and says, that on the 5th day of May 19 76 at 12 o'clock Noon ~~X~~M. he served the annexed Petitioner's Brief No.75-4116 in RE: General Electric Co. v. Occupational Safety & Health Rev. Comm.et al.

upon SEE SECOND SHEET

Esq(s)., Attorney(s)

for SEE SECOND SHEET

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thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

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that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 5th day of May 19 76

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